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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

Petitioner,

v.

LANNY K. HICKS,

Respondent.

Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual's flight from the police patrolling a high crime area is sufficient to constitute reasonable suspicion justifying an investigative stop of the individual, consistent with the provisions of the fourth amendment.

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STATE OF NEBRASKA

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LANNY K. HICKS,

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Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, the State of Nebraska, respectfully prays that a writ of certiorari issue to review the judgment of the Nebraska Supreme Court entered in the above-entitled proceeding on August 28, 1992.

OPINIONS BELOW

The decision of the Nebraska Supreme Court from which this action arises is reprinted in the appendix hereto, 1a, *infra*, and may also be found as *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992).

GROUNDS FOR JURISDICTION

The judgment of the Nebraska Supreme Court was entered on August 28, 1992, whereby the court reversed Respondent's conviction and remanded the case to district court for a new trial. Thereafter, on September 3, 1992, Petitioner filed a motion for extension of time to file a motion for rehearing, which was overruled by the Nebraska Supreme Court on September 25, 1992.

The jurisdiction of this Court to review the judgment of the Nebraska Supreme Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV

STATEMENT OF THE CASE

On October 28, 1990, City of Omaha Police Officers Mike Stewart and John Francavilla were assigned the four p.m. to midnight shift, patrolling a section of north Omaha (1:21-2:6). Near the beginning of their shift, they were summoned to the corner of 24th and Lake Streets by

Officers Dennis Clark and Mark Lang. These officers were conducting surveillance in a mobile crime prevention unit (a Winnebago recreational vehicle) on that corner (22:3-20; 24:3-12; 66:22-67:1). Local businesses had been complaining of the high incidence of criminal activity in the area.

Officers Clark and Lang were observing (through the use of binoculars) a group of black males huddled in front of a liquor store located between Grant and Erskine Streets, about a block-and-a-half away from 24th and Lake. Some members of this group appeared to be drinking liquor in violation of an Omaha city ordinance prohibiting public drinking. The officers also suspected that there may be some drug trafficking going on as well (23:3-12; 24:3-9; 67:25-68:6). Respondent was not part of this group of males.

Officers Stewart and Francavilla were to drive by the group of men under surveillance to see if they could spot anybody engaged in illegal activity and also to witness the group's reaction to the sight of a police cruiser (24:9-24; 68:7-17). They subsequently drove eastbound through an alley between Grant and Erskine (2:15-18; 45:4-7). As the cruiser emerged from the alley, Francavilla and Stewart heard someone yell, "[P]olice," very loudly. The group huddled in front of the liquor store then began to separate (3:22-4:2; 45:15-46:12).

Prior to this time, Officer Clark stated that from his position in the Winnebago, he noticed Respondent (hereinafter Hicks), a white male wearing a dark jacket, situated in a parking lot adjacent to 24th and Erskine. Hicks had just closed the door of a brown station wagon and

had begun to walk south on 24th Street towards the area under surveillance.

Moments before the cruiser's appearance from the alley between Grant and Erskine Streets, Officer Clark also observed a black male posted next to a building by the alley. Just before the cruiser came into view, the black male turned and yelled something to Hicks, who at that time was approaching the alley. Hicks thereupon ran back up the street and around a building to the north of the alley (69:7-70:24). According to Officer Clark it appeared that Hicks was running because he had been warned of the officers' presence. Officer Clark then advised Officer Lang to contact the cruiser regarding Hicks' apparent flight. Officer Clark testified as follows:

> Q What did you tell the cruiser to do, or what was the cruiser instructed to do?
>
> A Check the party because he had run. He was told the cruiser was coming. All of a sudden he bolted. We told them there was something suspicious about the party.

(71:14-18). Officer Lang advised Officers Francavilla and Stewart that a white male had run up the block and around a building to the north of the alley (4:3-16). Officer Stewart stated that "the other officers (in the surveillance unit) had advised us that it looked like he (Hicks) was trying to hide or allude [sic] us" (5:8-10).

Officer Francavilla backed the cruiser down the alley where they observed a white male (Hicks) matching the description Officer Lang had given of the individual who fled. The officers exited the cruiser, walked over to Hicks,

and asked him what he was doing. Hicks replied, "Nothing, I ain't doing nothing." Hicks then voluntarily stated that he had a warrant outstanding for his arrest (4:20-5:2). A subsequent identification check revealed that there were actually three outstanding warrants for Hicks' arrest (5:15-25).

Hicks was placed under arrest, patted down, and searched prior to being placed in the police cruiser (6:1-9). Found on Hicks were syringes, a bag of marijuana, and a clip to a twenty-two caliber semi-automatic pistol containing five bullets (6:20-7:1).

HOW THE FEDERAL QUESTION WAS PRESENTED

Hicks was charged with being a felon in possession of a firearm. The question here presented was first raised when Hicks filed motions to suppress the statements and physical evidence acquired as a result of his stop and subsequent arrest. In his motions, he alleged that the statements and physical evidence were obtained in violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution. These motions are reprinted in the appendix, *infra*, 15a-18a.

The district court overruled Hicks' motions and he was subsequently convicted of the crime charged. On appeal, Hicks again raised the question here presented by asserting that the trial court erred in overruling his motions to suppress. The Nebraska Supreme Court reversed, holding that Hicks' flight from the police was

insufficient to create a reasonable suspicion of involvement in criminal conduct.

REASONS FOR GRANTING THE WRIT

There is presently a conflict among the state courts and among the federal circuit courts as to whether flight from law enforcement officials is sufficient to justify an investigative stop. Furthermore, the state court's opinion concerns a decision on an important question of federal Constitutional law which has not been, but should be, decided by this court.

I.

A CONFLICT PRESENTLY EXISTS AMONG THE STATE COURTS AND AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL REGARDING THE QUESTION OF WHETHER FLIGHT FROM THE POLICE IS SUFFICIENT TO JUSTIFY AN INVESTIGATIVE STOP.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that the public's interest in effective crime prevention makes it reasonable for law enforcement officials to briefly detain and question individuals under circumstances where probable cause is lacking. The Court's emphasis in *Terry* was on the situation "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. at 30. To satisfy the fourth amendment's prohibition against unreasonable searches and seizures, such an intrusion by law enforcement officials must be based on "specific and articulable facts which, taken

together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. Later cases have dubbed the lesser standard of knowledge required for a *"Terry"* stop "reasonable suspicion." *See Reid v. Georgia,* 448 U.S. 438, 440 (1980); *Brown v. Texas,* 443 U.S. 47, 51 (1979). The presence or absence of reasonable suspicion must be determined in light of the "totality of the circumstances" confronting a police officer. *United States v. Cortez,* 449 U.S. 441, 417 (1981).

The question presented in this case is whether flight from the police is sufficient to constitute reasonable suspicion justifying an investigative stop. The federal circuit courts are divided on this issue. The sixth and eighth circuits have clearly held that flight from law enforcement officers is sufficient to justify an investigative stop. *See United States v. Jackson,* 741 F.2d 223 (8th Cir. 1984); *United States v. Pope,* 561 F.2d 663 (6th Cir. 1977); *See also United States v. Lane,* 909 F.2d 895 (6th Cir. 1990) (following *Pope*); *United States v. Haye,* 825 F.2d 32, 34 (4th Cir. 1987) (valid *Terry* stop where suspect fled from identified law enforcement agent). The District of Columbia circuit has reached a contrary conclusion. *See United States v. Green,* 670 F.2d 1148 (D.C. Cir. 1981); *Hinton v. United States,* 424 F.2d 876 (D.C. Cir. 1969).

The State Supreme Courts of Indiana and Wisconsin have explicitly held that flight from a law enforcement officer is sufficiently suspicious behavior to justify a temporary investigative stop. *See Platt v. State,* 589 N.E.2d 222 (Ind. 1992); *State v. Anderson,* 454 N.W.2d 763 (Wis. 1990). The Minnesota Supreme Court has also intimated that flight is a sufficient reason for an investigative stop. *City of St. Paul v. Vaughn,* 237 N.W.2d 365 (Minn. 1975) ("flight

from police officers will serve to furnish the basis of an investigative stop.") Intermediate state appellate courts have also adopted this reasoning. *See People v. Tribett*, 424 N.E.2d 688, 694 (Ill. App. Ct. 1981) (stop upheld where man darted into an alley after observing a police car ten or twenty feet away); *State v. Williamson*, 524 A.2d 655 (Conn. App. 1987) (though not explicitly stating flight alone is enough, the court held that an individual's flight through an eating establishment upon the approach of the police justified an investigative stop). Several states, however, have held that flight alone is insufficient to justify an investigative stop. *See State v. Stinnett*, 760 P.2d 124 (Nev. 1988); *People v. Shabaz*, 378 N.W.2d 451 (Mich. 1985); *People v. Aldridge*, 674 P.2d 240 (Cal. 1984); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983); *Watkins v. State*, 420 A.2d 270 (Md. 1980); *Dimascio v. Municipality of Anchorage*, 813 P.2d 696 (Alaska App. 1991); *State v. Talbot*, 792 P.2d 489 (Utah App. 1990).

Those jurisdictions which have held that flight furnishes a sufficient basis for an investigative stop have found that such action is "reasonable" police conduct within the provisions of the fourth amendment. In *State v. Anderson*, 454 N.W.2d 763 (Wis. 1990), officers of the City of Elkhorn, Wisconsin, were patrolling an alley when they sighted Anderson's car. When Anderson sighted the squad car containing the two officers, Anderson sped away from the area. The officers followed and eventually stopped Anderson's vehicle. The officers noticed that Anderson appeared to be trying to hide or pull something out from underneath the seat of the car. Officers ordered Anderson out of the vehicle and discovered a loaded .22

caliber revolver, a double-edged survival knife, and two steak knives.

The Wisconsin Supreme Court concluded that Anderson's conduct in driving rapidly away from the police after sighting a squad car was sufficiently suspicious behavior to justify a temporary investigative stop. The court emphasized that the fundamental focus of the fourth amendment is on reasonableness. Therefore, when faced with Anderson's flight at the sight of the police cruiser, the proper question to pose was, "What would a reasonable police officer reasonably suspect in light of his or her training and experience? What should a reasonable police officer do?" 454 N.W.2d at 766.

The *Anderson* court came to the following conclusion:

> Flight at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, "[i]t would have been poor police work indeed for an officer . . . to have failed to investigate this behavior further." *Terry*, 392 U.S. at 23, 88 S.Ct. at 1881.

Anderson, 454 N.W.2d at 766.

The court further noted that "nothing in the fourth amendment . . . requires that a police officer's suspicions

relate to particular criminal activity." 454 N.W.2d at 767. Moreover, it observed that "suspicious conduct by its very nature is ambiguous, and the principle [sic] function of an investigative stop is to quickly resolve that ambiguity." 454 N.W.2d at 766.

In *Platt v. State*, 589 N.E.2d 222 (Ind. 1992), Whitley County Sheriff Deputy Dennis Ruch was on routine patrol in his squad car at approximately 3:00 a.m. As Ruch traveled down State Road 205, he observed a car parked on the side of the road, headed the opposite direction. Ruch noticed someone in the driver's seat of the car. Ruch thereupon turned around and pulled in behind the parked vehicle. At that point, the parked car's lights went on, and it pulled away from the side of the road at a high rate of speed.

Deputy Ruch activated his lights and followed the vehicle, which eventually pulled off to the side of the road. When Ruch contacted the driver of the vehicle (Platt), he detected a strong odor of alcohol. Platt was subsequently given a breathalyzer test, which indicated that he had a blood alcohol content of .17%.

The Indiana Supreme Court held that Deputy Ruch's investigative stop of Platt's car was not an unreasonable search and seizure in violation of the fourth amendment. It held that a proper balance is struck under the fourth amendment by allowing police officers to stop temporarily an individual who flees upon seeing police or a squad car. The court quoted with approval *State v. Anderson's* observation that "suspicious conduct by its very nature is ambiguous." 589 N.E.2d at 226. The court further stated:

> Deputy Ruch was attempting to resolve the ambiguity created by Platt's suspicious behavior when he temporarily detained him. We will not proscribe such a reasonable response to an inherently suspicious activity. Indeed, the citizens of Whitley county would not have been well served had Ruch ignored his common sense reaction in the face of Platt's abrupt departure and allowed him to ramble down the highway with a BAC that turned out to be nearly two times the legal limit.

Id.

In *United States v. Pope,* DEA agents observed a suspect (Pope) fitting a drug courier profile in an airport concourse. When an agent approached Pope and displayed his credentials, Pope broke into a run and attempted to elude the agent.

The sixth circuit held that Pope's flight in the face of a clear showing of lawful authority supplied the agent with a reasonable suspicion that Pope was engaged in criminal activity. Although Pope's behavior before being approached by the agent was entirely consistent with innocent behavior, the court stated that "[f]light invites pursuit and colors conduct which hitherto has appeared innocent." 561 F.2d at 668.

In *United States v. Jackson,* 741 F.2d 223 (8th Cir. 1984), St. Louis police officers on routine patrol pulled their cruiser into an alley. The officers observed two men, Jackson and Johnson, in the alley. When Johnson saw the police car, he shouted "It's the police, man, run." 741 F.2d at 224. The officers subsequently chased the men down

and noticed a revolver protruding from Jackson's waistband.

The eighth circuit held that Jackson's flight justified his stop and subsequent arrest for carrying a concealed weapon. The court stated, "When Johnson shouted, "It's the police, man, run," and the two men fled, the officers had specific and articulable facts to justify stopping the men under the *Terry* standard." *Id.*

A primary concern of those jurisdictions which hold that flight does not rise to the level of reasonable suspicion is the protection of the right of individuals to "eschew interactions with the police." *Hicks,* 241 Neb. at 364, 488 N.W.2d at 364. According to these courts, mere flight upon the approach of the police cannot justify an "official intrusion upon the constitutionally protected interests of the private citizen." *Terry,* 392 U.S. at 21. Thus, these courts hold that before an investigative stop can be conducted by the police, flight must be combined with "some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight." *Hicks,* 241 Neb. at 362, 488 N.W.2d at 363. *See Stinnett,* 760 P.2d at 126 ("the actions of the police in this case were not justified by Stinnett's unprovoked flight alone."); *Aldridge,* 674 P.2d at 242 ("flight may imply a consciousness of guilt, and combined with other objective factors could justify an investigative stop."); *Thomas,* 660 P.2d at 1275 ("it is only when a person's effort to avoid police contact is coupled with an officer's specific knowledge connecting that person to some other action or circumstance indicative of criminal conduct that the evasive action, . . . takes on a sufficiently suspicious character to justify a stop."); *Watkins,* 420 A.2d at 274

("we agree with the majority of courts that view the unequivocal flight of a suspect upon seeing the police as not alone necessarily indicative of criminal activity."); *Shabaz*, 378 N.W.2d at 460 (flight "does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity [is] afoot."; *Green*, 670 F.2d at 1152 ("flight is not a reliable indicator of guilt without other circumstances to make its import less ambiguous.")

II.

THE STATE COURT'S OPINION CONCERNS A DECISION ON AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

The question of whether fleeing from the police, by itself, is sufficient to constitute reasonable suspicion under the fourth amendment has yet to be decided by this Court. This issue, however, touches squarely upon the balance to be struck between society's interests in effective crime prevention and detection and a citizen's right to be free from unwarranted harassment from the police. A review of this Court's fourth amendment decisions reveals that certiorari was granted on essentially this very question in *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988). The question was not reached in *Chesternut*, however, because the Court concluded that a separate issue was dispositive of that case. Although members of the Court have intimated that flight from the police is sufficient to constitute reasonable suspicion,[1] explicit guidance from the Court is needed.

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[1] *See California v. Hodari D.*, 111 S.Ct. 1547, 1549 n.1 (1991) ("California conceded below that Officer Pertoso did not have the 'reasonable suspicion' required to justify stopping Hodari. . . . That it would be unreasonable to stop, for brief

The State of Nebraska submits that the present case is indicative of the type of situation that confronts police officers on a daily basis, and is representative of why this issue should be definitively decided by the Court. Officers Lang and Clark of the Omaha Police Department were conducting surveillance in a high crime area of Omaha, Nebraska. Area merchants had complained of the high incidence of liquor violations and drug activity in the area. Lang and Clark were observing the activities of a group of males huddled in front of a liquor store up the street from the surveillance unit. Some members of the group appeared to be drinking liquor in violation of an Omaha city ordinance. The Officers also suspected that there may be some drug trafficking going on as well.

Officers Stewart and Francavilla were summoned to the area and asked by Officers Clark and Lang to drive by this group of individuals to see if they could spot any illegal activity and to witness the group's reaction to the sight of a police cruiser. As Stewart and Francavilla drove through the alley next to the group, they heard someone yell, "[P]olice," very loudly. Hicks, who was not a member of the group in front of the liquor store, was approaching the alley at this time. Officer Clark, from his view in the surveillance unit, observed a male posted next to the alley warn Hicks of the cruiser's presence. At that point, Hicks turned and ran up the street and behind

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inquiry, young men who scatter in panic upon the mere citing of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ('The wicked flee when no man pursueth')"); *Michigan v. Chesternut*, 486 U.S. at 576 (Kennedy and Scalia, JJ., concurring) ("respondent's unprovoked flight gave the police ample cause to stop him").

a building to the north of the alley. Francavilla and Stewart were alerted of Hicks' flight and subsequently stopped him to ask why he ran.

Petitioner asserts that the action taken by the officers was entirely reasonable and did not violate the fourth amendment. Hicks was running away from the police in a high crime area that was at that time under police surveillance. For the reasons set forth in *State v. Anderson, Platt v. State, United States v. Pope,* and *United States v. Jackson,* discussed in section I., *supra,* Petitioner believes that Hicks' flight from the police was sufficiently suspicious behavior to warrant an investigative stop. More importantly, Petitioner submits that any reasonable police officer, when faced with this type of situation, would entertain a reasonable suspicion that criminal activity may be afoot. The courts should not proscribe in the name of the fourth amendment police conduct which is entirely reasonable under the circumstances.

CONCLUSION

For each of the reasons noted above we pray that the writ prayed for be issued. Petitioner believes that flight from the police is sufficiently suspicious behavior to justify an investigative stop. Several state and federal circuit courts are presently split on this issue, and Petitioner

believes that the import of this particular Constitutional question merits review by this Court.

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APPENDIX

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellee,
v.
Lanny K. Hicks, Appellant.

Case Caption

State v. Hicks

Filed August 28, 1992. No. S-91-660.

Appeal from the District Court for Douglas County: Keith Howard, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Patrick J. Boylan for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

White J.

This is a criminal case in which the State charged the defendant-appellant, Lanny K. Hicks, with being a felon in possession of a firearm, in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989). The defendant pled not guilty and filed motions to suppress physical evidence and statements made to the police. The trial court overruled the motions, and thereafter a jury in the Douglas County District Court found the defendant guilty of the offense charged. The trial court sentenced the defendant to

prison for not less than 17 nor more than 34 months, with credit for 69 days' time served. This appeal followed.

FACTUAL BACKGROUND

On October 28, 1990, Officers Mark Lang and Dennis Clark of the Omaha Police Division were conducting surveillance in an area of Omaha, Nebraska, experiencing a high incidence of liquor violations and drug trafficking. From their position in a large, marked Winnebago vehicle parked at the corner of 24th and Lake Streets, the officers observed a group of black males gathered approximately a block and a half away. The group was standing near a liquor store located on the west side of 24th Street, just to the south of an alley which divides the block between Grant and Erskine Streets. Some of the men were holding liquor bottles, in violation of a city ordinance prohibiting drinking alcohol in public.

Shortly after 4 p.m., Lang and Clark contacted fellow officers John Francavilla and Mike Stewart, who were riding together in a marked police cruiser, and requested that they drive by the group of men under surveillance. The officers suspected that some of the parties might "drop or dump" alcohol or narcotics and generally just wanted to "see if we could get a reaction out of them."

Francavilla and Stewart responded by driving their cruiser eastbound through the aforementioned alley toward 24th Street. As the cruiser emerged from the alley, Francavilla and Stewart heard somebody yell, "[P]olice." Lang testified that from his position in the Winnebago, he could not hear any yelling, but saw what looked like

some people shouting a warning. At that point the group began to disperse.

While Lang concentrated on the group of men near the liquor store, Clark noticed a white male wearing a dark jacket close the door of a brown station wagon and walk south on 24th Street toward the area under surveillance. Clark testified that as the cruiser emerged from the alley, he saw a black man turn and yell something to the white man, who then turned and ran up the street and around the block. Clark told Lang to instruct Francavilla and Stewart to back up and "check the party" because "there was something suspicious about the way he "[a]ll of a sudden . . . bolted."

When Francavilla and Stewart backed down the alley as instructed, they saw a white man in a brown leather jacket walking toward them. The officers exited their cruiser and approached the man, asking him "what he was doing, what was going on." Stewart testified that when the man said, "Nothing, I ain't doing nothing," he asked the man why he was running. At that point the man said, "I got a warrant."

After the officers identified the man as Hicks, they ran a check and discovered that there were in fact three outstanding warrants for Hicks' arrest. The officers arrested Hicks, and Francavilla patted him down, discovering, among other things, a clip to a .22-caliber semi-automatic pistol and a number of bullets.

Reasoning from the defendant's possession of the clip that he may have discarded or hidden a weapon nearby, Stewart searched the area. When Lang informed him by radio of the brown station wagon, Stewart

approached the vehicle and ran a check on the license plates. After discovering that the car was registered to Hicks, he looked in the passenger-side window and saw the handle of a gun protruding from between the driver's seat and the front passenger seat. Stewart opened the unlocked door, seized the weapon, and returned to the cruiser.

As both officers and Hicks sat in the cruiser, Stewart and Francavilla engaged in a discussion regarding the weapon and whether it matched the clip found on the defendant. At that point Hicks stated, "[Y]ou can't charge me with that gun. It wasn't on me. You found it in my car. I will be able to get these charges dropped." Both Francavilla and Stewart testified that they did not ask Hicks any questions or solicit the statement in any way, but that Hicks just blurted it out.

At trial, Hicks testified that he loaned his car to a friend, Barbara Hoffman, at approximately 12:30 p.m. on October 28, 1990. He further testified that Hoffman returned later that afternoon and told him the car had broken down. He stated that he called another friend, who drove him to 24th and Erskine Streets at about 3:45 p.m. Hicks testified that after he unsuccessfully attempted to start the car, he was walking back to his friend's vehicle when a police cruiser approached, and its occupants jumped out and asked him for identification. Hicks denied that he was running at any point prior to this encounter and testified that he did not know there was a weapon in the front seat of his car. Hoffman largely corroborated Hicks' story, testifying that she purchased the weapon that afternoon and left it in the car when the car broke down at 24th and Erskine Streets.

ASSIGNMENTS OF ERROR

On appeal, Hicks argues that the trial court "erred in overruling the Defendant's motion to suppress the fruits of the stop and subsequent arrest of the Defendant on October 28, 1990. Statements made by the Defendant to Omaha Police officers should have been suppressed and ruled inadmissible at the Defendant's trial."

LEGALITY OF THE STOP

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court takes into consideration that the trial court observed the testimony of the witnesses. *Id.*

We first note that the State does not contest the assumption implicit in Hicks' argument that the officers "seized" him prior to his statement that there was a warrant out for his arrest. See, *U.S. v Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (a person is seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would believe he is not free to leave); *Michigan v. Chesternut*, 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988) (adopting *Mendenhall* test); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991) (every encounter between a police officer and an individual in a public place is not necessarily a seizure of the individual). We therefore proceed upon the premise that a seizure

occurred when the officers exited their cruiser, approached Hicks, and began asking him questions.

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the U.S. Supreme Court held that the public's interest in effective law enforcement makes it reasonable to detain and question individuals under certain circumstances in which probable cause to arrest is lacking. However, in order to protect "the individual's right to personal security free from arbitrary interference by law officers," *Brignoni-Ponce*, 422 U.S. at 878, the *Terry* court held that such limited investigatory stops are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person is, was, or is about to be engaged in criminal activity. The same standard is applied in determining the propriety of an investigatory stop under Neb. Const. art. I, § 7. *State v. Patterson, supra; State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990).

In this case, Officer Stewart testified at the suppression hearing that the decision to question Hicks was based upon information from the other officers that they saw Hicks flee upon approach of the cruiser. The fact that Stewart and Francavilla did not personally witness Hicks' flight is immaterial. See *State v. Zemunski and Whiteley*, 228 Neb. 536, 423 N.W.2d 443 (1988) (collective knowledge of the law enforcement agency for which an officer acts may provide the basis for a search and seizure, but some communication of that knowledge to the officer

conducting the search and seizure is required). Thus, the sole issue presented by this appeal is whether an individual's flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop of the person. The trial court held that such flight is alone sufficient to create a reasonable suspicion of involvement in criminal conduct. We disagree and therefore reverse.

A majority of jurisdictions addressing the issue hold that flight alone is insufficient to justify a *Terry* stop. See, e.g., *Dimascio v. Municipality of Anchorage*, 813 P.2d 696 (Alaska App. 1991); *State v. Talbot*, 792 P.2d 489 (Utah App. 1990) (collecting cases); *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Aldridge*, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983); *Watkins v. State*, 288 Md. 597, 420 A.2d 270 (1980) (collecting cases). Instead, courts require proof of some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight at the sight of the police. *Aldridge, supra; Thomas, supra; Watkins, supra.*

These courts recognize that allowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while a police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer some questions, neither is the person under any obligation to answer. *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The person may decline

to listen to the questions at all and simply go on his or her way. *Id.* If the option to "move on" is chosen, the person "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." 460 U.S. at 498.

In other words, "A citizen has as much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not justify his detention." *Smith v. U.S.*, 558 A.2d 312, 316 (D.C. App. 1989). Flight upon approach of a police officer may simply reflect the exercise – "at top speed" – of the person's constitutional right to " 'move on.' " *Shabaz*, 424 Mich. at 63, 378 N.W.2d at 460. *Terry* and *Royer* stand for the proposition that exercise of this constitutional right may not itself provide the basis for more intrusive police activity.

Nor is an intense desire to avoid contact with the police necessarily indicative of a guilty conscience. Fear of dislike of authority, distaste for police officers based upon past experience, exaggerated fears of police brutality or harassment, and fear of unjust arrest are all legitimate motivations for avoiding the police. *In re D.J.*, 532 A.2d 138 (D.C. App. 1987).

The Colorado Supreme Court emphasized this point in *Thomas, supra,* in which four police officers were on routine patrol in an unmarked police vehicle when they saw a man they recognized as "Cherokee" Thomas standing in the parking lot of a fast-food restaurant. Thomas apparently recognized the officers too, because upon making eye contact with them, he thrust his hand in his

pocket and began to run. The officers gave chase, following him into a nearby building, where one officer saw him throw something into a water pitcher. The officers subsequently caught him and retrieved the objects, which turned out to be six balloons containing cocaine, and the state appealed.

The Colorado Supreme Court affirmed the trial court's decision, rejecting the prosecution's argument about Thomas' "furtive gesture" of placing his hand in his pocket and running at the sight of the officers provided an articulable suspicion sufficient to justify the chase. The court reasoned:

> The problem with the so-called "furtive gesture" as the basis for a stop in its inherent ambiguity. From the viewpoint of the observing police officer, an innocent move may often be mistaken for a guilty reaction. From the perspective of the person observed, the "furtive gesture" might be impelled by a variety of motives, from an unsettling feeling of being watched to an avoidance of what might be perceived as a form of harassment.

Thomas, 660 P.2d at 1275.

A prime concern underlying the *Terry* decision is protecting the right of law-abiding citizens to eschew interactions with the police. Authorizing the police to chase down and question all those who take flight upon their approach would undercut this important right and upset the balance struck in *Terry* between the individual's right to personal security and the public's interest in prevention of crime. We therefore join those jurisdictions holding that flight from a police officer is sufficient to

justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct. See, e.g., *U.S. v. Morgan*, 759 F. Supp. 896 (D.D.C. 1991) (flight from scene of recently reported burglary upon approach of police enough to warrant investigatory stop); *State v. Wylie*, 10 Conn. App. 683, 525 A.2d 528 (1987) (flight by person whom officer had been informed was carrying a weapon enough to create articulable suspicion); *Clinkscale v. State*, 158 Ga. App. 597, 281 S.E.2d 341 (1981) (flight by person identified as possible suspect in recent burglary enough); *Dimascio, supra* (act of breaking off meeting with another man and fleeing upon sight of police, then returning and resuming conversation, only to flee again when police returned, combined with lateness of the hour and reputation of vicinity as a high-crime area enough); *People v. Collom*, 268 Cal. App. 2d 242, 73 Cal. Rptr. 707 (1968) (officer justified in arresting a man whom he saw engage in a furtive exchange of some object for money and then run upon sight of the officer). We next must determine whether any such corroborating circumstances exist in this case.

This case is very similar to *People v. Mamon*, 173 Mich. App. 429, 435 N.W.2d 12 (1988), *rev'd on other grounds* 435 Mich. 1, 457 N.W.2d 623 (1990). There, two police officers were driving on routine patrol in a marked squad car through an area known for narcotics activity. As the officers approached a man standing on a corner near a public phone, the man took off running. The officers left their vehicles and pursued the man on foot, noticing that he removed a burgundy-colored case from his pocket and dropped it during the chase. The officers ultimately caught the man and retrieved the case, which contained

cocaine. The trial court quashed an information charging the man with possession of a controlled substance, and the state appealed.

A Michigan intermediate court of appeals affirmed the trial court's decision. The court began by addressing the circumstances existing before the man began to run. Though the incident occurred in a high-crime neighborhood, the court determined that a person's presence in such an area cannot, by itself, provide the basis for an investigatory stop. In so doing, the court noted that the officers were not responding to a particular complaint of wrongdoing in the area and that the man made no furtive gestures prior to seeing the officers. Concluding that the officers lacked an articulable basis for stopping the man as he stood on the corner, the court turned to the significance of his flight upon their approach. Noting the ambiguous nature of flight as an indicator of guilt, the court held that the act of running at the sight of police patrolling a high-crime area did not provide the particularized grounds necessary to support a reasonable suspicion that criminal activity was afoot.

Here, as in *Mamon*, Officers Francavilla and Stewart were on routine patrol when the incident occurred. They were not responding to any call or report of suspicious activity in the area. Though Officer Lang testified at trial that the portion of 24th Street involved is known for narcotics activity, we agree with the numerous decisions holding that a person's presence in such an area by itself does not warrant a suspicion that that person is involved in crime. *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *In re D.J., supra* (thousands of people

live and go about their legitimate business in neighborhoods designated as high-crime areas by the police); *Shabaz, supra; Aldridge, supra.*

It is also clear that Hicks gave no outward indication of involvement in illicit activity prior to the approach of the cruiser. He was not among the group of men huddled together and carrying liquor bottles. He was simply walking down the street when the cruiser emerged from the alley. As in *Mamon,* the officers lacked an articulable basis for suspecting Hicks of involvement in criminal activity prior to the point at which he turned and ran.

When asked at the suppression hearing why he and Francavilla stopped Hicks, Officer Stewart testified that "[w]e felt he was acting suspiciously in the fact that the other officers had advised us that it looked from their vantage point that he was trying to hide or allude [sic] us." In the absence of circumstances corroborating the conclusion that Hicks was involved in criminal activity, Officer Stewart's testimony reveals nothing more than a hunch. Though perhaps the hunch was correct in this case, if the police are allowed to stop and question citizens upon less than particular and specific facts creating an articulable suspicion of criminal behavior, " 'the risk of arbitrary and abusive police practices exceeds tolerable limits.' " *Thomas,* 660 P.2d at 1277, quoting *Brown v. Texas, supra.* Because Officer Stewart was not able to point to specific facts corroborating the inference of guilt gleaned from Hicks' flight, the investigatory stop in this case was constitutionally infirm.

EFFECT OF THE UNCONSTITUTIONAL SEIZURE

Evidence obtained as the fruit of an unconstitutional search and seizure is inadmissible in a state prosecution. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). The clip and bullets found on Hicks, as well as the handgun found in his car and the statement he made to the officers, were all the direct result of the initial stop and therefore inadmissible at trial. However, a prerequisite to an appeal based upon error in the admission of evidence is a timely objection stating the grounds therefor unless the grounds are apparent from the context. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

The first witness called by the State at Hicks' trial was Officer Lang. Lang testified, without objection, that Officer Stewart told him of finding a clip on Hicks and a handgun in his car. This testimony was objectionable, both as hearsay and based upon the unconstitutionality of the stop. Moreover, Hicks also made no objection as the State displayed the handgun to the jury and elicited Lang's testimony that it was the gun found by Francavilla and Stewart. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992). Though the State waited until the testimony of Officer Francavilla to actually introduce the handgun into evidence, the "cat was out of the bag" long before then. Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection. *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975). Hicks waived his objection to

evidence regarding his possession of the clip and handgun by failing to make a timely objection.

Hicks did promptly object to testimony regarding the statement he made while sitting in the cruiser. Hicks' defense was based upon the theory that Hoffman placed the gun in Hicks' car without his knowledge, after she borrowed the car earlier that afternoon. Hicks' statement to the officers that he did not care about the gun because it was in his car rather than on his person could be interpreted as an implicit admission of ownership. The State attempted to cross-examine Hicks on this very basis. We cannot say the trial court's error in overruling Hicks' motion to suppress his statement to the police was harmless beyond a reasonable doubt. See *State v. Reynolds*, 240 Neb. 623, 483 N.W.2d 155 (1992). Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,	)	DOC. 127 NO. 799
vs.	)	MOTION TO SUPPRESS STATEMENT
LANNY HICKS, Defendant.	)	(Filed Jan. 23, 1991)

COMES NOW the Defendant, by and through his attorney, and moves the Court to suppress and exclude from use against him any and all statements made by him on October 23, 1990 to Officer Francavilla #1134 and Stuart #1149 and any and all officers of the State for the following reasons and each of them:

1. That such statements of the Defendant were not freely and voluntarily given.

2. That such statements of the Defendant were coerced by threats and promises.

3. That such statements of the Defendant were given without his having been informed of his rights contrary to law.

4. That such statements of the Defendant were the fruits of custodial interrogation occurring as the direct result of an unlawful arrest of the Defendant, the arrest having been made without probable cause.

5. That such statements of the Defendant were obtained contrary to the established law of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and in violation of the Defendant's

rights guaranteed by the Constitutions of the United States and the State of Nebraska.

WHEREFORE, the Defendant prays that the Court suppress and exclude from use against him any and all statements made by him to any and all officers of the State with regard to the above entitled matter.

LANNY HICKS, Defendant,

By Patrick J. Boylan
PATRICK J. BOYLAN #16799
Assistant Public Defender
Attorney for Defendant

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. LANNY HICKS, Defendant.	)	DOC. 127 NO. 799 MOTION TO SUPPRESS PHYSICAL EVIDENCE (Filed Jan. 23, 1991)

COMES NOW the Defendant, by and through his attorney, and moves the Court to suppress and exclude from use against him any and all evidence gained by means of a search of the Defendant's person and immediate surroundings conducted by officers Stewart #1149 and Francavilla #1134, of the Omaha Police Division on or about October 28, 1990 at 24th and Erskine, for the following reasons and each of them:

1. The search of the Defendant's person and immediate surroundings was made without warrant and without authority.

2. The search of the Defendant's person and immediate surroundings was made prior to and not incident to a lawful arrest.

3. The initial detention and the arrest of the Defendant were without probable cause.

4. The search of the Defendant and his immediate surroundings was conducted without probable cause and without the consent of the Defendant.

WHEREFORE, the Defendant prays that the Court suppress and exclude from use against him any and all

evidence obtained for the reason that such evidence was obtained in violation of the rights of the Defendant as guaranteed by the Constitutions of the United States and the State of Nebraska.

LANNY HICKS, Defendant,

By Patrick J. Boylan
PATRICK J. BOYLAN #16799
Assistant Public Defender
Attorney for Defendant